No. 78-586

In the Supreme Court of the United States

OCTOBER TERM, 1978

LOUIS OSTRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
WADE LIVINGSTON
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 47a-63a) is reported at 577 F.2d 782. The opinion of the district court (Pet. App. 1a-46a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1978. A petition for rehearing was denied on July 10, 1978. The petition for a writ of

certiorari was filed on October 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner is entitled to have his conviction vacated on collateral attack because the government, in disclosing evidence during pretrial discovery, did not include certain information that petitioner might have been able to use to supplement his impeachment of a key government witness.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of violating various provisions of the securities laws and the mail and wire fraud statutes and of conspiracy to commit those crimes. He was sentenced to three years' imprisonment and a fine of $55,000. The court of appeals affirmed. *United States* v. *Dioguardi*, 492 F.2d 70 (2d Cir.), cert. denied, 419 U.S. 829 (1974).[1] In April 1977, petitioner moved to vacate his conviction pursuant to 28 U.S.C. 2255, contending that the government had violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963). After an extensive hearing, the district court denied the petition (Pet. App. 1a-46a)

[1] On December 11, 1974, petitioner moved for a new trial on the ground of newly discovered evidence. The district court denied the motion (422 F. Supp. 93 (S.D. N.Y. 1976)) and the court of appeals affirmed, 551 F.2d 303, cert. denied, 430 U.S. 946 (1977).

and the court of appeals affirmed (Pet. App. 47a-63a).

1. The evidence at petitioner's trial is detailed in the opinion of the court of appeals on direct appeal. 492 F.2d at 73-75. Briefly, it showed that petitioner and several others, including Michael Hellerman and co-defendant John Dioguardi, had conspired to raise artificially the price of nearly worthless stock of the Belmont Franchising Corporation from a few dollars to nearly $50 a share and to sell the security to the public.

Hellerman was a principal government witness at trial. Petitioner's defense consisted in large part of an attempt to impeach Hellerman by portraying him as a corrupt and venal criminal who had received substantial benefits because of his cooperation with the government. This impeachment, the district court noted (Pet. App. 43a-44a), included the following: Hellerman repeatedly admitted his participation in numerous criminal activities, including swindles that had earned him over $250,000, even after he had begun to cooperate with the government and had agreed not to engage in further criminal conduct. He admitted that during the preceding five years he had been involved in approximately eight to twelve criminal acts, including some in connection with Natco, Inc., and Merchandise Plus, Inc., for which he had not been prosecuted, and that in three other cases he had pleaded guilty. He acknowledged his role in frauds involving the securities of Belmont Franchising Corporation and four other companies. He admitted that

he was involved in having someone pay bribes to New York City policemen, and he testified to his well founded belief that the United States Attorney's office would convince the local authorities not to prosecute him. He acknowledged that he had purchased stocks, dresses, and jewelry that he knew to have been stolen, that he had paid money to others for the purpose of bribing state court judges, a state liquor authority investigator, and a union delegate, that he had been barred by the Securities and Exchange Commission from activities in the securities industry since 1961, that he had told someone to file false papers with the SEC hiding his interest in a brokerage firm, that he had participated in a scheme to submit a fraudulent check to a Bahamian bank, and that he had disobeyed court orders.

2. Petitioner's motion to vacate his conviction concerned the government's failure to disclose certain activities that had resulted in the release to Hellerman of $80,000 belonging to Natco, Inc., and Merchandise Plus, Inc., and the government's decision not to oppose Hellerman's motion for enlargement of his bail limits to enable him to travel to Switzerland.[2]

[2] In addition, petitioner contended that the government had violated its *Brady* obligation by not disclosing evidence concerning a reduction in Hellerman's legal fees and that Hellerman had testified falsely at trial concerning his intent to make restitution to victims of the fraud. Petitioner did not make a *Brady* motion prior to trial. However, petitioner's co-defendant made a pretrial request for

> any * * * material in the possession of the Government bearing adversely on the credibility, character and reputation of Michael Hellerman; and * * * any other material relating to any matter which defense counsel could properly use in cross-examination to inquire into Hellerman's motive and bias in favor of the Government or expectation of favor from the Government.

(Pet. App. 39a, 55a.)

The facts developed at the evidentiary hearing on these contentions are set forth in the opinions below (Pet. App. 49a-52a, 6a-19a) and may be summarized as follows:

As to the Natco incident, the evidence showed that early in 1971 Hellerman was involved in a bankruptcy fraud whereby the assets of the Natco and Merchandise Plus Corporations would be sold at a discount and the proceeds would be taken from the corporations (A. 1339-1343).[3] As the fraud evolved and the conspirators drained the companies' assets, eventually $80,000 of corporate funds remained (A. 1357-1358, 1582-1583). Before this money could be diverted, Hellerman informed the FBI of the scheme, and the government obtained control of the $80,000 (A. 1363-1369, 1389, 1582-1583).

Several Assistant United States Attorneys, including Assistant United States Attorney Robert Mor-

[3] "A." refers to petitioner's appendix in the court of appeals. Hellerman and several other persons were indicted for their involvement in the scheme. Counsel for co-defendant Dioguardi knew of the Natco indictment from a pretrial interview of Hellerman and questioned Hellerman about Natco in the presence of the jury (Pet. App. 15a).

villo,[4] were concerned that the government had no legal right to keep the money and that the government might be accused of precipitating the corporations' bankruptcy by holding on to it (A. 1588-1589). At about the same time, Hellerman asked Assistant United States Attorney Morvillo to release the $80,000 to him because he needed the money to pay off loan sharks (A. 1353, 1367-1368, 1574, 1583-1584). Morvillo emphatically refused and told Hellerman that the money would only be released to an attorney representing the corporations and that if the money were used for other than corporate purposes Hellerman would be prosecuted (A. 1367, 1381-1382, 1490-1491, 1585, 1594, 1641-1642). The government then released the money to an attorney, Edward Kurland, who had produced a letter stating that he represented Natco, that he was demanding the return of the $80,000 on behalf of the company, and that he would be responsible for the disposition of the funds (A. 1643, 1652-1657; A.X. 14).[5] Although Morvillo gave the money to Kurland with the direction that it be placed in a corporate account, Hellerman eventually obtained most of the money and used it to pay off the loan sharks who were pressing him for payment (A. 1643, 1652-1657, 1384, 1408, 1787-1791).

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[4] At all relevant times, Morvillo was either chief of the fraud unit or chief of the Criminal Division of the United States Attorney's office for the Southern District of New York.

[5] "A.X." refers to the exhibits to the appendix filed by petitioner in the court of appeals.

The bail incident related to the summer of 1972, after Hellerman had been named as a defendant in several indictments. Hellerman asked the district court to extend his bail limits so that he could travel to Switzerland for the purpose of finding a place where he could live safely after testifying for the government (A. 1437, 1632). After Hellerman's attorney had assured Assistant United States Attorney Morvillo that Hellerman would not use the trip as an opportunity to hide funds abroad or to flee, the government decided neither to oppose nor to consent to Hellerman's motion, and the motion was granted (A. 1630-1632).

In an extensive opinion, the district court held that the government's failure to inform petitioner prior to trial of its role in the Natco incident or its position on the bail modification motion did not warrant relief under Section 2255, concluding (Pet. App. 44a-45a):

> In view of the extensive data provided to the jury, we find that the Natco information is not material, in the sense that it probably would not have affected the outcome of the trial. In words quoted from *Agurs*, p. 102 [*United States* v. *Agurs*, 427 U.S. 97 (1976)], it "shed no light on Sewell's [read Hellerman's] character that was not already apparent from the uncontradicted evidence." Nor does the suppressed evidence raise a reasonable doubt. One more promise or benefit to Hellerman is no evidence of Ostrer's innocence. Therefore, the Court concludes that the suppression of the Natco $80,000.00 matter does not require us to grant Ostrer a new trial.

> This Swiss trip does not warrant a new trial since, for the same reasons set forth above, there is no probability that this information would have raised a reasonable doubt. The jury was well [acquainted] with the Government's lenient treatment of Hellerman, and one more instance of Government largesse would not have been of any significance.

The court of appeals affirmed in a thorough opinion on which we substantially rely (Pet. App. 47a-63a).

ARGUMENT

Both lower courts found that, in the circumstances of this case, the government's failure to disclose the details of the Natco incident or bail modification motion did not violate its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and did not deprive petitioner of a fair trial. This essentially factual conclusion is correct and does not warrant further review.

The heart of petitioner's claim is that the district court found corrupt practices on the part of the government in its release of the $80,000 in Natco funds to Kurland. Specifically, petitioner asserts that Assistant United States Attorney Morvillo, acting through a ruse, "participated in and aided a successful effort by Hellerman to obtain for his personal use $80,000 that belonged to the estate of a bankrupt corporation," that "a theretofore well-regarded former high official in the United States Attorney's Office had engaged in corrupt and undisclosed practices

in dealing with the key prosecution witness," that the testimony of the witness was "tainted by corrupt and secret practices on the part of a high prosecutorial official," that there was "a carefully orchestrated effort by a certain person or persons in the Government to coverup the violations around which this case revolves," and that the Court must review this case "in order to discourage and remedy corrupt practices" (Pet. 6-8). The short answer to these allegations is that neither the district court (which, in petitioner's words, made "careful and well-supported findings" (Pet. 9)) nor either opinion of the court of appeals adopted this view of the record.

To the contrary, the district court, while concluding that the government should have communicated its information about the $80,000 to petitioner (Pet. App. 14a), specifically found that petitioner "has been unable to confirm the contention that these funds were intentionally released to Hellerman so he could pay the loansharks" (*id.* at 11a) and that "the $80,000.00 can be considered as merely one facet of the Government's broader program to guarantee Hellerman's safety rather than an effort to put cash in his pocket" (*id.* at 43a). Similarly, the majority opinion of the court of appeals stated: "The undisclosed evidence fell far short of a Government benefit in exchange for the witness' cooperation. It remains undisputed that Morvillo refused to turn over the $80,000 to Hellerman and that, upon deciding to turn it over to Natco, had warned him and Schustek [Hellerman's associate] that they would be prosecuted if they diverted the money to noncorporate purposes. At

most the Government's role, in view of Schustek's disregard of this warning, became ambiguous" (*id.* at 56a). And the concurring opinion in the court below essentially adopted the findings of the district court (*id.* at 60a-61a). Hence, none of these opinions contains any suggestion of corrupt practices.[6]

Nor is this a case where the court of appeals "substantially ignored, distorted, or altered the careful and well-supported findings of the District Judge" (Pet. 9). Rather, both lower courts reviewed petitioner's claims under the standards of *United States* v. *Agurs*, 427 U.S. 97 (1976), differing only in a few minor respects. Both courts relied heavily on the same evidence at trial that impeached Hellerman's credibility, with the court of appeals quoting from and relying extensively upon the opinion of the district court (Pet. App. 57a-58a).[7] Significantly, neither court found that Hellerman had committed perjury at petitioner's trial (*id.* at 32a, 35a, 54a).

While it is true that the district court, unlike the court of appeals, found that the pretrial *Brady* request in this case—a request made by petitioner's

[6] In any event, as the Court remarked in *United States* v. *Agurs*, 427 U.S. 97, 110 (1976), "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."

[7] Although the court of appeals, unlike the district court, characterized the government's role with respect to the $80,000 as "ambiguous" and the incidents involved as a "mere drop in the bucket" (Pet. App. 56a), these characterizations related to a difference of opinion over ultimate rather than evidentiary facts and are a far cry from a distortion or alteration of the record.

co-defendant, rather than petitioner—was "specific" (Pet. App. 54a-55a, 39a),[8] it, like Judge Moore, who reached the same conclusion, still found that the undisclosed evidence about the Natco incident was not material under *Agurs* (*id.* at 44a, 58a). As the district court noted, "it probably would not have affected the outcome of the trial. * * * [I]t 'shed no light on * * * [* * * Hellerman's] character that was not already apparent from the uncontradicted evidence' " (*id.* at 44a, quoting *United States* v. *Agurs*, *supra*, 427 U.S. at 102). The court therefore found that "no reasonable person could say that the suppressed evidence *probably would* have altered the outcome of the trial" (*id.* at 42a; emphasis in original). Similarly, the court of appeals concluded that "[d]isclosure of this information would not have created a reasonable doubt in the minds of the jurors who found [petitioner] guilty" (*id.* at 58a).[9] Petitioner has

[8] Petitioner contends (Pet. 30) that, in light of what defense counsel knew, he could not have made a more specific request for *Brady* material. However, counsel learned at least by the time of trial that Hellerman had been involved in the Natco swindle (Pet. App. 13a), and he could have framed a request at that time calling for material in connection with this incident. See note 3, *supra*.

[9] Our response is centered on the Natco incident, petitioner's principal complaint. The district court adequately answered petitioner's other contentions, concerning the bail modification motion (Pet. App. 16a-19a), the reduction in Hellerman's legal fee (*id.* at 21a-23a), and Hellerman's restitution promise (*id.* at 29a-34a). The court of appeals summarily rejected these contentions (*id.* at 59a), noting that "the suggestion that the Government's non-opposition to the court-approved enlargement of bail would have been useful impeachment evidence borders on the frivolous" (*id.* at 56a).

offered no reason to interfere with these consistent determinations.[10]

Finally, this case does not have "ominous implications for the integrity of the criminal justice system in the second circuit" (Pet. 29-34). Petitioner's citation (Pet. 27-28) of numerous cases from that circuit in which the court of appeals carefully scrutinized the government's compliance with its *Brady* obligation certainly belies that assertion. There is no reason to suppose that federal prosecutors obligated to see that justice is done (see *Berger* v. *United States*, 295 U.S. 78, 84 (1935)) will jeopardize convictions by withholding information that a reviewing court at a post-conviction hearing might find could have created a reasonable doubt at trial. If the case is one that depends upon the credibility of a witness, and if the withheld evidence is highly probative or the remaining evidence available to impeach the witness is slight, there is always the possibility that the court might find that the undisclosed evidence might have tipped the balance. Here, however, both lower courts carefully reviewed the evidence before the jury reflecting on Hellerman's veracity

[10] Indeed, other courts of appeals have applied heavier burdens on a defendant than did the Second Circuit in cases where the undisclosed evidence would have been relevant only for purposes of impeachment. See *Galtieri* v. *Wainwright*, 582 F.2d 348, 363 & n.28 (5th Cir. 1978) (en banc); *Garrison* v. *Maggio*, 540 F.2d 1271 (5th Cir. 1976), cert. denied, 431 U.S. 940 (1977). See also *United States* v. *Lasky*, 548 F.2d 835, 839-840 n.3 (9th Cir.), cert. denied, 434 U.S. 821 (1977).

(see pages 3-4, *supra*) and correctly concluded that the additional impeachment evidence withheld from petitioner would not have changed the outcome of petitioner's trial.[11]

[11] The facts of this case differ considerably from *United States* v. *Librach*, 520 F.2d 550 (8th Cir. 1975), cert. denied, 429 U.S. 939 (1976), where the prosecutor suppressed evidence that a government witness had received a direct payment of almost $10,000 for his testimony, since that evidence shed far greater light on the witness's motive to testify in the government's favor and the witness's friendly relationship with the government had only partially been disclosed at trial. The error in *United States* v. *Garza*, 574 F.2d 298 (5th Cir. 1978), was the trial judge's failure to submit certain defense exhibits to the jury, not the suppression of evidence by the prosecution.

This case is more like *United States* v. *Minichiello*, 510 F.2d 576 (5th Cir. 1975), where defendant learned after trial that a government witness had been reimbursed for some expenses. The court denied post-convention relief, holding that "the jury had adequate information that [the witness] was trying to save his own skin. The question whether he was paid, and for what, is not so material as to require a new trial" (*id.* at 578).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
WADE LIVINGSTON
Attorneys

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